United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 75-4215

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC. and ERE INDUSTRIES, INC., *Respondents*.

On Application for Enforcement of an Order of The National Labor Relations Board

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BRIEF FOR A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC. and ERE INDUSTRIES, INC., RESPONDENTS.

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I. ISSUES

A. Whether the Board's finding that the Company violated Sections 8(a)(5) and (1) by making unilateral changes in the terms and conditions of employment is supported by substantial evidence;

B. Whether the Board's finding that the Company violated Section 8(a)(1) by discharging the six (6) employees who refused to work on a regularly scheduled work

day, Palm Sunday, is clearly erroneous or supported by substantial evidence;

C. Whether the Board's finding that the Company violated Sections 8(a)(1) by refusing to hire an employee who previously had been lawfully discharged for excessive absenteeism is supported by substantial evidence; and

D. Whether the Board's finding that the Company violated Section 8(a)(1) by questioning employees about the union is supported by substantial evidence.

II. COUNTERSTATEMENT OF THE CASE

In this proceeding, the National Labor Relations Board seeks enforcement of its *pro forma* decision of June 30, 1975, affirming, with one exception, findings of an Administrative Law Judge that Respondents engaged in several unfair labor practices in 1973 and 1974 in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended.

During that period, Respondent A. Lasaponara & Sons, Inc., a cheese manufacturer in Oriskany, New York, was acquired by Respondent ERE Industries, Inc. and thereafter was operated as a wholly-owned subsidiary of ERE. While the circumstances surrounding the acquisition are quite relevant to the issues presented, this case raises no successorship issues.[1]

A. The Decision of the Administrative Law Judge.

On November 22, 1974, the Administrative Law Judge found that:

1. Lasaponara violated Sections 8(a)(5) and (1) by making unilateral changes in the terms and conditions of employment and by otherwise ignoring the Union it had "agreed" to recognize as of April 1, 1974, despite uncon-

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1 *NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272 (1972).

troverted testimony and documentary evidence that the Union's proposed written stipulation for recognition as of April 1, 1974 had not been agreed to or signed by Lasaponara (A. 6-18);

2. Lasaponara and ERE violated Section 8(a)(1) by discharging six (6) employees who refused to work on Palm Sunday, April 7, 1974, despite uncontroverted evidence that each Palm Sunday was and always had been an essential and regularly scheduled workday at Lasaponara's plants and throughout the entire Italian cheese industry engaged in the production of highly perishable ricotta cheese used for holiday delicacies (A. 28-32);

3. Lasaponara and ERE violated Section 8(a)(3) and (1) by refusing to rehire Peter Muraca on May 27, 1974, despite the fact that Muraca's discharge by Lasaponara for cause in January, 1974 (during the height of the Union's organizational activities) for excessive absenteeism and gambling was not contested; and

4. Lasaponara violated Section 8(a)(1) by advising one employee in November, 1973, that it would be futile to select a union; by interrogating employees in December, 1974, as to why they thought they needed a union; by interrogating two employees about the signing of union cards; and by crumpling a petition signed by a number of employees protesting the scheduling of work on Palm Sunday, 1974, despite the absence of evidence that *any* of these actions were threatening or coercive (A. 18-25).

Both Lasaponara and ERE were ordered to offer reinstatement, with back pay, to the six (6) discharged employees; to offer employment, with back pay, to Muraca; and to cease and desist from interfering with the employees in the exercise of their Section 7 rights. Lasaponara alone was ordered to rescind the unilateral changes made in the terms and conditions of employment, upon request of the Union.

B. The Decision of the Board.

By *pro forma* Decision and Order dated June 30, 1975, the Board affirmed without discussion "the rulings, findings and conclusions of the Administrative Law Judge . . . as modified" (A. 43). Footnote 2 to the Decision modified the Administrative Law Judge's decision by reversing his finding that the crumpling of a petition protesting the scheduling of work on Palm Sunday itself was a violation of Section 8(a)(1). Footnote 4 to the Board's decision made technical changes, not relevant here, in the order proposed by the Administrative Law Judge. Chairman Murphy dissented as to another 8(a)(1) violation, on the ground that calling an employee a "troublemaker" did not constitute a threat of reprisal (A. 45).

C. The Evidence.

1. Lasaponara's Recognition of the Union

Lasaponara is engaged in the production of Italian cheese and related cheese products, distributed in greater metropolitan New York to pastry shops, Italian shops and grocery stores (A. 114). Prior to April, 1974, it employed approximately twenty employees in its plant in Oriskany, New York; thereafter, the work force was reduced to twelve (A. 129).

On December 3, 1973, Joseph Lasaponara, president of the Company, received a letter from the Union claiming to represent all production and maintenance employees at the plant (A. 58, 154). On December 5, 1973, the Union filed a representation petition with the Board (A. 58, 156). On December 7, 1973, the Union informed Lasaponara that certain of its employees had been elected to the union shop committee (A. 59-60, 157).

Because Lasaponara was then engaged in negotiations for its sale to another company, Mr. Lasaponara requested that a Mr. Zappone of the Oneida County Development

Corporation[2] meet with the Union (A. 114-115). At a meeting on December 10, 1973, Mr. Zappone advised the Union representatives, Messrs. Kozma and DeBella, that

> "... the Company was involved in discussions with some other outfit about merging and an election or union at the time might interrupt or could in fact jeopardize the operation of the thing and we could lose twenty people's jobs" (A. 60).

The Union representatives replied that the Union "wasn't out to drive anyone out of business" or "interested in disrupting anything" and requested a meeting with Mr. Lasaponara (A. 60, 74-75).

On December 12, 1973, such a meeting was held. Messrs. Kozma and DeBella were again advised of the sale of the business (A. 115-116), of the Company's "internal problems" (A. 75) and its "financial problems" and need for "additional cash" (A. 70). Mr. Kozma testified that Mr. Lasaponara expressed "no objection to the union" (A. 60-61), but stated that the Company had to have time "to consummate their negotiations" (A. 62).

Consequently, at that meeting and another on December 14, 1973, a number of dates for recognition were discussed and the Union finally proposed April 1, 1974 (A. 62, 75-76). Kozma and DeBella told Mr. Lasaponara that they "would prepare a recognition agreement and withdraw the petition for election" (A. 62, 76-77). Thereafter, a request for withdrawal of its petition was filed with the Board on December 20, 1973 and approved on December 26, 1973 (A. 64). Mr. Kozma testified that "at the time we withdrew the petition, we had everybody believing that Mr. Lasaponara was going to sign the recognition" (A. 68-69). The Union told the employees that there were "internal

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[2] The Development Corporation had been responsible for bringing the business into the community, had built the plant and had to approve its sale to any purchaser (A. 59, 70, 74-75, 115).

problems'' (A. 117, 132) and ''there was no union until April 1st'' (A. 132-133). A request to withdraw a similar petition filed by the Union with the New York State Labor Relations Board was filed on January 14, 1974, and withdrawal was approved by that Board on February 8, 1974 (A. 67-68).

On December 20, 1974, Mr. Kozma and four of the employees met with plant manager Fazzino and presented him with a typewritten recognition agreement after signing it in the presence of Mr. Fazzino. The recognition agreement provided in full:

> ''Effective April 1, 1974, Lasaponara & Sons, Inc. will recognize the Mechanics Educational Society of America, AFL-CIO as the sole collective bargaining agency on behalf of the employees employed at its plant located on Base Road, Oriskany, New York for rates of pay, wages, hours of work and any other conditions of employment.
>
> By.....
>
> By.....
>
> Witness
>
> .....
>
> .....
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> .....
>
> Dated day of , 1973'' (A. 158).

Fazzino advised the Union representatives that he would pass the document on to Mr. Lasaponara (A. 63-64). The Agreement was never signed and remained undated. Mr. Kozma made no further inquiries as to why the agreement had not been executed by Mr. Lasaponara (A. 71), and Mr. DeBella made only two inquiries concerning the unexecuted Recognition Agreement, one in January 1974 (A. 77-78) and one in February (A. 78-79).

The record reflects the reason for the prospective nature of the recognition agreement. Mr. Lasaponara testified that he advised Kozma and DeBella that

> ". . . if I do not sell the business, I would recognize the union and we could sit down and discuss it" (A. 116, 119, 135).

Mr. Kozma testified that he agreed to the April 1, 1974, date because the outcome of negotiations would take several months and were doubtful (A. 69-70, 72), that Lasaponara told him "he doesn't know whether they [the negotiations] will be consummated or not" (A. 69-70), and that he "didn't expect" to sign a contract with a new owner, but with Mr. Lasaponara (A. 69, 72). He concluded:

> "I did not know he was going to sell his business, I went along because he gave me recognition as of April 1st and we were going to sit down and negotiate a complete contract' (A. 70).

He testified that:

> "I had no way of knowing there was a new owner. I expected to do business with Mr. Lasaponara and negotiate a contract with him on April 1st" (A. 72).

Mr. Debella's understanding also was to the effect that the Union expected the recognition agreement to be with Mr. Lasaponara:

> "Q. Who did you expect was going to sign the recognition agreement that had not as yet [March 1974] been signed?
>
> A. The man that we reached an agreement with, Mr. Lasaponara" (A. 85).

Negotiations between the Company and ERE Industries began in August 1973 (A. 141) and were concluded with the sale of all outstanding stock to ERE on March 7, 1974,

the date of the preliminary closing and escrowing of all but one of the necessary financial instruments (A. 118, 141). The final closing occurred on April 23, 1974, and Mr. Oddi, president of ERE became president of the Company (A. 141). Mr. Lasaponara became sales manager (A. 118-119). On March 27, 1974, Mr. Oddi met with all the employees and indicated essentially that he would become president when the final closing had been held (A. 142, 143, 127).

Mr. DeBella of the Union was informed on March 25, 1974, that the sale had been consumated and was given Mr. Oddi's telephone number (A. 85-86). The Union also was informed by one of the employees of their March 27, 1974, meeting with Mr. Oddi (A. 72-73).

At no time prior to the hearing in this case was Mr. Oddi advised of the existence of a proposed recognition agreement or that the Union represented a majority of the employees (A. 144). In January 1974, he was informed by Mr. Lasaponara only that there had been union activity, but that it was under control (A. 144). Not one of the employees (11 of 20 had already signed union cards) raised the question of a union at Mr. Oddi's meeting with them on March 27, 1974 (A. 145-146).

2. The Refusal of Six Employees to Report for Scheduled Work On Palm Sunday

The busiest time of the year in the Ricotta cheese business is Easter, followed by Christmas, Thanksgiving and New Years Eve (A. 128, 146) and it has been the custom and practice not only at the Lasaponara plant, but also in the industry, to schedule work for Palm Sunday and the weekends before the other holidays (A. 128-129, 146). Plant Manager Fazzino testified that the employees had worked on Palm Sundays for the last twenty-five (25) years (A. 129).

Ricotta cheese cannot be made in advance and held for storage, i.e., it has a short "shelf life". Moreover, the milk from which the cheese is made cannot be held and the product must be shipped daily before Easter for distribution to the bakeries and stores. This accounts for the need to increase the work week to 7 days before holidays (A. 128).

At the end of the workday on April 5, 1974, the Friday before Palm Sunday (A. 138), certain employees presented a typewritten petition, signed by twelve (12) of the Company's twenty (20) employees, demanding that Palm Sunday not be scheduled as a work day and advising that they would not report for work (A. 155).

When he received the petition, Fazzino, who had not previously been informed of the employees' demand, became upset and crumpled it up (A. 133-134). He then reopened it, smoothed it out, assembled the employees and explained that he needed them in order to get production out at this very critical period (A. 139, 140). Six of the twelve employees who had signed the petition responded to his plea for help and reported to work on Sunday with the rest of the work force. Six did not report for work (A. 94, 131).

On Saturday, the day before Palm Sunday, Fazzino received a call from DeBella who asked if the petition had been presented. Fazzino stated that he didn't deserve to be treated by the employees in such a fashion because he had been good to everyone (A. 129).

> "He called me around 2:30 Saturday afternoon, April 6th, and asked me if Eva Wilson gave me the Petition, I say yes and I told Mr. DeBella I was very upset, it was a holiday, I said I don't recognize this piece of paper, it was a holiday and everyone knows we have to work. I have cheese, I have production to meet, I have milk to come in and I don't know what to do. Mr. DeBella said its a religious holiday, they don't want to work. I said fine, they should tell

> me in advance, they don't want to work on Palm Sunday. He said they are willing to work overtime on the following week. The following week, I explained to Mr. DeBella, it was too late. I manufacture and distribute. Goshens, they send a truck out, my merchandise had to go out on a Thursday of the week, so Mr. DeBella said we'll try to have them work overtime, I told Mr. DeBella it was too late" (A. 128).

Fazzino advised Oddi of the employees' demand and of the six absences. Oddi told him that, since he was not yet in control of Lasaponara, he couldn't tell Fazzino what to do, but suggested caution. After the sale was finally consummated on April 24, 1974, Oddi commenced an investigation of the matter and consulted with his corporate counsel about the refusal of the six employees to work. Corporate counsel referred him to labor counsel in Buffalo. On June 7, 1974, within 5 days after receiving labor counsel's recommendations, Oddi called Fazzino and instructed him to discharge the six employees because of their refusal to work on Palm Sunday (A. 131-132, 146-149).

3. The Refusal to Rehire Muraca

Peter Muraca had signed a union card and was a member of the union committee during his employment at the Oriskany Plant (A. 109-110). In November, 1973, he was moved from his outside employment as forklift operator to an inside position of machine operator, because "I was getting sick outside, working out there and I have been going to the doctor" (A. 113, 110-111).

In late December 1973 Muraca and a fellow employee were suspended for two weeks for not having reported on a scheduled work day (A. 111-112). At his request, Muraca was paid his vacation pay in addition to his regular pay (A. 111-112).

Fazzino testified that Muraca had regularly absented himself from work for "a couple of months" and that

Muraca admitted to him that the absenteeism was due to illnes, lack of sleep, and gambling every night (A. 129-130). Fazzino gave him another chance, but when Muraca again failed to report for work around the Christmas holiday, he suspended him for two weeks (A. 130). Fazzino told him to report to work in two weeks, on Monday, January 7, 1974, or on Wednesday, January 9, 1974, whichever suited Muraca (A. 130).

At the conclusion of the two week period of suspension, Muraca again failed to report to work or call in and, when he did report on January 21, 1974, he was told by Fazzino that the Company had assumed he had quit and that a replacement had been hired (A. 112, 130-131).

Muraca collected unemployment compensation for two or three weeks, but thereafter his claim was denied because of the basis of his discharge (A. 117). Union representative DeBella shortly thereafter telephoned Mr. Lasaponara and asked that the Company change its report to the state unemployment office as to the reason for Muraca's discharge, to enable Muraca to qualify for compensation. Mr. Lasaponara said he "couldn't do a thing like that because I would be putting the company in jeopardy with unemployment" (A. 117).

Muraca testified that more than five months later, on May 27, 1974, he went to the plant and asked Fazzino if he "could have my job back" (A. 112-113). According to Muraca, he was told by Fazzino that "I know we need people, I have to wait until this union thing gets settled . . . you got me in trouble and some guy from the Board had a meeting with him [Fazzino] and some guy Oddi" (A. 112-113).

Muraca replied:

> ". . . if I am a good worker and need help, I don't know why I can't get work" (A. 113).

On June 10, 1974, Muraca again asked Fazzino "could I have my job back" (A. 113).

Each time, Fazzino responded that he would let Muraca know, but Muraca was not contacted or rehired (A. 112-113).

Despite uncontroverted testimony that immediately after Easter, 1974, the work force at the plant was reduced from twenty (20) to twelve (12) and remained at that level as of the date of the hearing in these proceedings (A. 129), Muraca testified that, on his second visit to the plant in June, 1974, he saw that Fazzino "was hiring all these new people" (A. 113).

4. Alleged Interference With Section 7 Rights

(a) *Supervisor Kosh's Statement to Bartle*

Gary Bartle, who had been employed at the plant as a vat dipper since July 1973, testified that on an unspecified time in November 1973 he was told by one Kosh that "if there is a union coming in that it would not be permitted" (A. 106). Kosh said nothing more, Bartle did not reply and the circumstances surrounding the incident were not described (A. 106), except that Kosh's tone was friendly, not threatening and non-coercive (A. 108).

Bartle's supervisor was Fazzino (A. 105). Kosh was production foreman at the time, had no authority to hire or discharge, had no policy-making authority and was not authorized to make the alleged statement (A. 127).

The uncontradicted testimony of the Union witnesses was that the Union's first contact with the employees was "on or about the first of December or just prior to that" (A. 57), that the Union's first meeting with the employees occurred on December 4, 1973 (A. 58) and that the union's first communication with the Company was received on December 3, 1973 (A. 58, 154).

(b) *President Lasaponara's Meetings with the Employees*

During the latter part of December 1973, Joseph Lasaponara met with the employees, two at a time, and, accord-

ing to the testimony of Eva Wilson, Union committeewoman, said:

> ". . . if we had a union, we wouldn't be a family, we would be like numbers . . ." (A. 88).

She testified that when she asked him about insurance and raises, he replied,

> ". . . he couldn't give us as long as we were negotiating with the union" (A. 88).

Other employees, called as witnesses by the General Counsel, gave essentially identical testimony (A. 95, 101, 103-104, 108, 135-137, 137-140). Employees Peck, Bolton, Radley, and Smith, testified that Mr. Lasaponara was polite, friendly and made no threats or promises (A. 97-98, 102, 135-140).

Mr. Lasaponara admitted meeting with his employees, testified that no promises of any kind were made (A. 125-126). William Radley testified also that when fellow employee Bonville asked for a raise during the meeting, Mr. Lasaponara replied that

> "If he did give a raise, it would constitute a bribe" (A. 135-136).

(c) *Plant Manager Fazzino's Interrogation of Two Employees*

Employee Linda Smith testified that during the week of January 8, 1973, she and fellow employee Karen Marcelletta went to Mr. Fazzino's office to "ask him why he was in such a bad mood" (A. 101). She testified that Fazzino:

> " . . . asked Karen and I who signed Union cards and we told him we didn't know. He said its okay, he knew who signed them and asked if Karen, me and Pete Muraca started the Union and we said no, and he said he knew who started it" (A. 102).

(d) *The Crumpling of the Refusal-To-Work Petition*

Union Committeewoman Wilson presented the refusal-to-work petition to Plant Manager Fazzino after working hours on the Friday before Palm Sunday (A. 90-91, 138). Wilson testified that Fazzino

> "... got kind of mad and crumpled it up and threw it on the floor and wanted to hear it from everybody's mouth."

In response to a leading question from the Board's attorney, she also testified:

> "Q. Any remarks during this conversation directed to you? A. Yes, he said I was a trouble maker" (A. 91).

Fazzino denied calling Wilson a troublemaker (A. 129).

III. ARGUMENT

A. The Board's Finding that the Company Violated Sections 8(a)(5) and (1) by Making Unilateral Changes in Terms of Employment is Unsupported by Substantial Evidence

The critical issue underlying this charge is whether the Company recognized the Union as the bargaining agent for its employees at the Oriskany plant. If, as we contend, there was no recognition, the Company, of course, remained free to make unilateral changes in the terms and conditions of employment and the charge falls.

Remarkably, the record in this case reflects that the circumstances critical to a determination of this issue are virtually undisputed. It is the reasonableness of the inferences drawn from the facts by the Administrative Law Judge and adopted by the Board which is at issue here.[3]

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[3] Under the familiar "substantial evidence" rule of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, the Supreme Court cautioned that "the substantiality of evidence must take into account whatever in the record detracts from its weight" and went on to make clear that:

> [A]reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that de-

These proceedings acquired a complexity of enormous proportions, quite unnecessarily, for two reasons: one, the General Counsel's insistence on prosecuting the case on the theory that the Union was orally recognized on December 14, 1973, (a theory rejected by the Administrative Law Judge), and the General Counsel's refusal to give any significance whatever to the recognition agreement, drafted by the Union, which by its very terms would provide for recognition only as of April 1, 1974; the other, the Administrative Law Judge's determination that the written recognition agrement was conditioned on the sale of the business being *consummated*, whereas the testimony of both Company and Union officials was that the recognition agreement was conditioned upon the sale of the business *not being consummated.*

Indeed, even in this Court, the General Counsel persists in his original theory of an *oral* agreement of recognition as of December 14, 1973 (Pet. Brief, pp. 5, 6, 12), desipite the fact that the Board, by adopting the findings of the Administrative Law Judge, chose to rest its decision solely on the basis of a *contingent* agreement to recognize. The Company and the Board differ principally on the precise nature of the contingency. Board counsel's attempt to substitute his rationale for that of the Board must, of course, be rejected. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965).

In any event, the General Counsel's theory that recognition occurred on December 14, 1973, is totally unsupported by the facts. The Union's demand for recognition was

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cision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. 340 U.S. at 488.

This Court has given heed to *Universal Camera's* mandate that a reviewing court not merely be a judicial echo of Board decisions and has set aside Board findings and conclusions which rest, as here, on improperly drawn inferences. *NLRB* v. *Martin A. Gleason, Inc.*, —— F.2d ——, 91 LRRM 2682 (March 3, 1976).

made on December 3, 1973, and its petition with the Board was filed on December 5, 1973. Its first meeting with the Company was held on December 12 and the Union was told, as it had been two days earlier, that the Company was experiencing financial difficulties, that negotiations were underway for the sale of the business and that organizational activity at that time could jeopardize the sale and result in a loss of twenty jobs in the community.

It was at the December 14 meeting that the Union proposed to defer its activity to a later date so as to allow enough time for negotiations to proceed to a conclusion. Kozma and DeBella told Mr. Lasaponara that they would prepare an agreement recognizing the Union as of April 1, 1974, and would withdraw the election petitions they had filed with the state labor board and the NLRB.

One week later, when the typewritten recognition agreement was prepared, Kozma and four of the employees presented it to the Plant Manager. The employees were told that there were "internal problems" and that "there was no union until April 1st" (A. 132). The agreement, of course, was never signed by the Company.

Because the General Counsel's theory totally *ignored* the recognition agreement which embodied the terms of the Union's proposals made at the December 11, 1973, meeting, the Administrative Law Judge and the Board understandably rejected it.

The Administrative Law Judge, on the other hand, correctly perceived that the recognition agreement was necessarily a contingent one. His difficulty lay in an inability to find support in the record for what he perceived was "the logical consistency of all of the facts".[4] Thus, he

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[4] As to these critical facts, it is impossible to determine what credibility determinations were made by the Administrative Law Judge, since findings were based on a "composite of the credited aspects" of the testimony of a number of witnesses representing differing interests and further were based on the "logical consistency of all of the facts" (A. 8, fn. 7; A. 9, fn. 8; A. 10, fn. 11).

concluded that the agreement to recognize was contingent upon the consummation of the sale (A. 17), despite the testimony of both Union and Company officials to the contrary.[5]

Mr. Lasaponara testified that he advised Kozma and DeBella that

> "if I do not sell the business, I would recognize the union . . . " (A. 116; see also 119, 135).

Kozma and DeBella had concurred, because they knew the negotiations were doubtful and did not know what the outcome would be (A. 69, 72). They agreed that their recognition was contingent upon the Lasaponara family retaining control, for each conceded that he did not expect to sign a contract with any new owner, but with Mr. Lasaponara (A. 69-70, 72, 85).

The "logical consistency of all of the facts", to borrow a favorite expression of the Administrative Law Judge, is that the Union agreed to defer its demand for recognition without an election until the outcome of negotiations. If the sale was not consummated or if Mr. Lasaponara retained a controlling interest after the "sale" or "merger", the Union would be recognized without the need for an election. If the sale were in fact consummated and, as indeed did occur, Mr. Lasaponara sold his ownership interest, the Union still had signature cards from a majority of the employees to present to the new owner.

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[5] Indeed, this conclusion is in direct conflict with his finding (A. 17) that "the employer and union agreed to keep the matter of formal recognition and formal contracts in abeyance until the 'sale' or 'merger' of the controlling ownership interest *had been determined*" (emphasis added) and is inconsistent with his finding (A. 17) that "the facts are clear that the employing entity, in December 1973, had no question as to the union's majority status [11 cards out of 20], but in fact agreed that such status existed. Thus, the employer's action in agreeing to recognize the Union in the future, without other evidence, fixed the Union as the recognized exclusive collective bargaining agent of the employees involved."

Any other interpretation not only flies in the face of the facts, but is illogical.[6] If Mr. Lasaponara had agreed to recognize the Union and bind the employing entity, he would have done so before the transfer of stock occurred. If the Union had not agreed to defer recognition to await the outcome of the negotiations, it would not have drawn up an agreement which by its terms was to become effective April 1, 1974, the date that Mr. Lasaponara indicated would give negotiations ample time to be concluded one way or the other. If the Union had intended to obtain recognition from the employing entity before its sale, it would have insisted that Mr. Lasaponara execute the recognition agreement while he still had authority to bind the employing entity.

The only *logical* inference to be drawn from the facts is that the Union, not wanting to risk the loss of jobs in the community, agreed to gamble on Mr. Lasaponara's retaining contractual authority to bind the employing entity.

In any event, the logical consistency of the "facts" cannot ignore the ultimate fact that Mr. Lasaponara never did sign the recognition agreement which the Union proposed. The explanation for the Union's failure to press Mr. Lasaponara to execute the typewritten agreement, is, of course, quite simple: the sale would certainly be concluded well before April 1, 1974, and if Mr. Lasaponara retained control or contractual authority, the Union felt certain that his oral promise of future recognition would be honored. If Mr. Lasaponara lost control and contractual authority after the sale, the Union knew he could not longer bind the Company.

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[6] Moreover, if, *as suggested* by Board counsel at page 12 of Petitioner's brief, the parties intended both an informal oral recognition on December 14, 1973, and a formal written recognition as of April 1, 1974, it would represent a truly remarkable approach on the part of a labor organization to recognition. In our experience, unions do not feel the need for more than one recognition agreement.

It is clear that the findings of the Administrative Law Judge, as adopted by the Board, as to a violation of Section 8(a)(5) and (1) based on the so-called unilateral changes in wages, benefits and conditions after ERE took control of the Company, are unsupported by substantial evidence.

B. The Board's Find That the Employees Were Wrongfully Discharged for Refusing to Work Palm Sunday Is Unsupported by Substantial Evidence and Is Clearly Erroneous

The Administrative Law Judge, and thus the Board, concluded that the Company violated 8(a)(1) by discharging the six employees who refused to work, as scheduled, on Palm Sunday of 1974, because they were engaged in a protected concerted activity.[7] That conclusion not only is unsupported by the record, but is clearly erroneous as a matter of law as well.

Basic to the Company's contentions are the facts, virtually undisputed, which surrounded this incident:

(1) Palm Sunday had always been a workday for A. Lasaponara & Sons and every other Italian cheese maker in the industry.

(2) Easter is the busiest season for the industry.

(3) The employees, who knew that they were expected to work on Palm Sunday, waited until the end of the Friday workday preceding Palm Sunday to make their refusal-to-work demand.

(4) No explanation was given the Company as to why the employees, who always had worked on Palm Sunday, suddenly felt unable to work on a religious holiday. The General Counsel introduced no evidence as to the religious beliefs or feelings of those who signed the petition.

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[7] No violation of 8(a)(3)—"discriminatory" discharge—was found for the reason that such findings would be "somewhat speculative" (A. 32).

(5) Ricotta cheese is perishable and production and distribution schedules to meet Easter market demands are tight and inflexible.

(6) Overtime work on other days between Palm Sunday and Easter could not make up for the production time lost on Palm Sunday.

(7) The employees, as well as the Union, knew that the Company was in serious financial difficulty.

(8) After Plant Manager Fazzino explained to the employees the critical need for Palm Sunday production, six of the twelve employees who had signed the petition agreed to work that day, together with the other eight employees who had not signed the petition.

(9) The employees did not intend to discuss the question of working on Palm Sunday with the Company Plant Manager; rather, they announced their refusal to work on Palm Sunday.

1. The Employees' Activity on Its Face Was Unprotected

Only recently, in *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 95 S.Ct. 977 (1975), the Supreme Court had occasion to restate the parameters of the protected concerted activities right embodied in Section 7 of the Act. The Court said:

> "Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,' as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of

> the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' 29 U.S.C. § 151." 95 S.Ct. at 984.

Section 8(a)(1) of the Act implements Section 7 and provides, in substance, that an employer may not interfere with, restrain or coerce employees in organizing, bargaining or "other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

The record is silent as to what organizing, bargaining or "other mutual aid or protection" purpose or interest was being served by the employees' refusal to work on Palm Sunday, except that the petition presented to Fazzino spoke in terms of a "religious holiday that is important to us". Despite the long history of scheduled work on Palm Sunday both at the plant and in the industry, the stated purpose may indeed truly reflect a religious protest on the part of the six employees. But *Emporium* teaches that concerted action by a minority of the employees to protest employment conditions is unprotected under the Act and exposes those employees to discharge. There, a minority of the employees, protesting alleged racial discrimination by their employer,[8] disregarded efforts of their union to obtain relief through contractual procedures and engaged in picketing. The Board had affirmed the Trial Examiner's dismissal of the complaint, finding that the employee's conduct

> "was no mere presentation of a grievance, but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees." 192 NLRB at 185.

The Court of Appeals reversed. The Supreme Court, however, concluded that the conduct was *not* protected concerted activity and lawfully could form the basis for the

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[8] The Court noted, at footnote 15 of its opinion that concerted action by minority groups expousing religious grounds would stand on the same footing.

employees' discharge, despite the fact that it might form the basis for relief under the Civil Rights Act. The Court said,

> "The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered." 95 S.Ct. at 989.

Remarkably, neither the Board in its decision nor the Board's counsel in his brief here cite *Emporium,* which, we submit, is dispositive of the issue.[9]

Even so, other Board precedent holds that employees may not dictate to an employer the way in which they would arrange their hours of work, without being subject to the penalty of discharge. In the very case cited by the Administrative Law Judge, *Polytech, Inc.,* 195 NLRB 695, 696 (1972), the Board said:

> "The principle of these [Board] cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do."

This, of course, is precisely what the employees intended to do in this case. They attempted the converse of the usual case where employees agree to work regular hours but refuse to work overtime. Here the employees agreed to work overtime but refused to work regular hours. However, the effect would have been the same: the employees would have received their regular pay (albeit in part as

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[9] The decision, issued by the Supreme Court three weeks after the filing of the Company's brief below with the Board, was called to the Board's attention by the Company by letter dated February 20, 1975.

overtime) while dictating to the Company what hours they were to work. As the Board said in *Swift Co.*, 124 NLRB 394, 397 (1959):

> "The employees' refusal to work overtime on March 11 constituted an attempt to work on terms prescribed by themselves. The Board and the courts have squarely held that such a refusal to work provides the employer with valid ground for discharge."

2. In a Balancing of Employee Rights Against Employer Interests, the Employee's Activity Was Unprotected in View of the Damage to the Company and Absence of Compensatory or Countervailing Employee Interest to Be Served

Furthermore, even if the employees' conduct was not, as we believe, clearly unprotected on its face, it should be held unprotected when balanced against the destructive financial blow the employees were about to inflict upon the Company.

In *NLRB* v. *Washington Aluminum*, 370 U.S. 9 (1962), the Supreme Court spoke of the necessity of balancing the goals of the employees against the effect on the employer, in determining whether concerted activity was protected or unprotected. The Court said:

> "It is of course true that § 7 does not protect all concerted activities . . . this Court's more recent pronouncement . . . denied the protection of § 7 to activities characterized as 'indefensible' because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities." 370 at 17.

The Court went on to say that concerted action to correct the uncomfortable working conditions the employees encountered in *Washington Aluminum* was not indefensible.

Subsequent Board and Court cases have recognized this need for accommodation of employee and employer interests.

In *Shelley & Anderson Furniture Mfg. Co.* v. *NLRB*, 497 F.2d 1200 (C.A. 9, 1974), the Court of Appeals stressed that the activity found protected therein "would not have had a significant impact upon the operation of the business" and would not disrupt production or otherwise "necessitate any unusual action on the part of the Company". 497 F.2d at 1203. Conversely, in *Dobbs House, Inc.* v. NLRB, 325 F.2d 531, 539 (C.A. 5, 1963), the Court, in holding a "mass departure of waitresses during the dinner hour is not a reasonable method of protest against the firing of a supervisor", stated the test as follows: "The cause of the employees' grievance must be considered in determining the reasonableness of their course of conduct undertaken in protest". In *Serv-Air, Inc.*, 162 NLRB 1369, 1377-1378 (1967), the Board in affirming the Trial Examiner, considered as a factor whether the time chosen for the activity was "inappropriate" and whether there were "over-riding business considerations" of the Company in determining whether concerted activity was also protected. Even in the sole authority relied upon by the Judge, *Polytech, Inc.*, 195 NLRB 695, the Board emphasized the "excessive and unduly burdensome" overtime work and "undesirable and fatiguing working conditions" which formed the basis of the protest in that case.

In this case there were no uncomfortable working conditions, no health or safety hazard, no ignored grievances, and no affirmative employee interest to be pursued. The aim of the employees was not to exert pressure in support of collective bargaining demands. The employees simply wanted to inflict economic harm to the Company without compensatory gain to themselves, a purely vindictive and negative object. The means chosen were to refuse to work on a designated day which, because of the characteristics of the particular business and perishable nature of the product, made it imperative that work be performed on that day—Palm Sunday—as it always had been in the

past. The employees did not even give the Company an opportunity to discusse the subject, a consideration which the Board recognized as important on the issue of protected activity in the *Serv-Air* case, where the Trial Examiner pointed out that the employees were trying to present a grievance, not trying to "take into their own hands the establishment of working conditions . . ." 162 NLRB at 1377. As the Court of Appeals in that case agreed,

> "The record shows a work stoppage but not a walkout There was no refusal to supply fire protection to the air base. Substantial evidence supports the Board's finding that the purpose of the work stoppage was to present and discuss the grievance." *NLRB* v. *Serv-Air, Inc.*, 401 F.2d 363, 365 (C.A. 10, 1968).

On the other hand, contrast the destructive effect the refusal to work would have had on Lasaponara. The Company already was in deep financial trouble, and desparately trying to keep itself together in order to complete the sale to ERE. Easter is the busiest season of the year and Palm Sunday, consequently, was a key workday. Ricotta cheese must be made on a day-to-day basis. Hence the refusal of the employees to work on Palm Sunday meant more from a financial standpoint than just spoiled cheese, however disturbing that would be. It meant, in addition, lost sales, lost customers and the consequent damage to the firms goodwill which, in its precarious financial state, was perhaps its most valuable asset. These facts are therefore similar to the actions of employees condemned by the Board in *Marshall Car Wheel & Foundary Co.*, 107 NLRB 314 (1953), without even the arguable rationale as in *Marshall* that the action was taken in support of a collective bargaining objective. In *Marshall*, employees walked out in support of negotiating demands just as molten metal was being poured and only quick work by Campany supervisors and non-strikers prevented substantial damage to the Company. The Board, with Court approval,

properly condemned such activity as not protected. 218 F.2d 409 (C.A. 5, 1955). Here, while the actions of the employees were not as dramatic as in *Marshall,* the potential effect of this action on the financial health of the Company was even more devastating. Hence, the refusal to work should be similarly condemned; if not for itself, as in *Marshall,* then certainly because of the imbalance between the employees' goals and the damage to the Company.

Of course, the fact that Fazzino was able to persuade sufficient employees to remain on the job to avert an economic disaster does not excuse the excesses of those who refused to work, or make their actions protected. *NLRB* v. *Marshall Car Wheel & Foundry Co.,* 218 F.2d 409 (C.A. 5, 1955).

The Judge here attempted to bolster his decision by his finding that the refusal to work here could not be presumed to be more than a "one-time strike" (D. p. 34). But exactly the opposite inference should have been drawn from these facts. Here the employees walked out at perhaps the most critical time of the year for the Company simply because they did not want to work. If the employees were prepared to walk out at that time, it is logical to infer that they would not hesitate to walk out before any of the other three important holiday seasons or at any other time when the spirit moved.

3. The Judge's Decision on Protected Activity Is At Variance With His Finding of Representation

The Judge's conclusion that the employee activity herein was protected is also at variance with his earlier finding that, at the time, the employees were represented by the Union. If the Union truly represented the employees, there is even more reason to condemn the precipitous actions taken by the employees here. In *Wash-*

ington Aluminum, one element that the Supreme Court found significant in condoning the immediate walkout taken by the employees in that case was that they:

> "were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievance to their employer. Under these circumstances they had to speak for themselves as best they could" 370 U.S. at 14.

The Board in *Polytech* made the same observation. 195 NLRB at 696. Here, the fact that the no-work demand was signed and presented by employees, not the Union representative; that it was signed by only a portion of the workforce; and that only six of twenty employees actually refused to report strongly suggests that the Union did not consider itself to be their recognized bargaining agent and that the employees did not deem themselves so represented.

Furthermore, as only a minority of the unit employees (six of twenty) actually refused to work, if the employees were actually represented by an exclusive collective bargaining agent, the refusal to work must be deemed a minority strike, which is, of course, unprotected. *Emporian Capweli Co.* v. *Western Addition, supra; NLRB* v. *Draper Corporation,* 145 F.2d 199 (C.A. 4, 1944). Even under the most liberal view that minority strikes not contrary to Union policies may in some cases be protected, *Shop Rite Foods, Inc.,* 171 NLRB 1498 (1968), the actions of the minority here in refusing to work on a critical production day which could have led to financial disaster for the Company cannot be deemed action in support of Union policies.

4. There Was No Condonation By The Respondents

The Judge also made an alternate finding that, in any event, the Company "condoned" the refusal to work be-

cause it said or did nothing between Palm Sunday and June 7, 1974, the day of discharge (D. p. 34, n. 30). Condonation "may not be lightly presumed from mere silence", *NLRB* v. *Marshall Car Wheel & Foundary Co., supra*, at 414, "but must clearly appear from some *positive act* by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred" (emphasis supplied).

> "Condonation can be found and is invocable only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee or his misconduct and agrees to a resumption of company-employee relationship as if no misconduct had occurred" *Packer's Hide Association* v. *NLRB*, 360 F.2d 59 (C.A. 8, 1966).

See also *Ohio Stove Co.*, 180 NLRB 868, 869 (1970); *NLRB* v. *Tanner Motor Livery*, 419 F.2d 216, 222 (C.A. 9, 1969). There was no such affirmative action here and the Administrative Law Judge made no such finding. As soon as Fazzino was informed of the refusal to work, he called Oddi. However, the sale had not yet been finalized and Oddi merely suggested that Fazzino exercise caution. Fazzino merely told the employees who refused to work that Mr. Oddi would be notified. Once the sale was finalized, Mr. Oddi, the Company's new president, consulted first corporate counsel then labor counsel and, within five days after receiving a legal opinion from labor counsel, instructed Fazzino to discharge the six employees for failing to report to work on Palm Sunday.

The burden is on the General Counsel to prove condonation, *Ohio Stove Company, supra*. Here, not only was that burden not met, but the uncontradicted testimony showed that the Company, immediately following the final closing on the transfer of ownership, took steps to investigate the incident and seek legal counsel. There was no forgiveness of the incident and the time lapse between the incident and

the Company's action was reasonable. For these reasons, the alternate finding of the Administrative Law Judge, adopted by the Board, is erroneous.

C. The Board's Finding That the Company Violated Sections 8(a)(3) and (1) By Refusing to Rehire Muraca Is Unsupported By Substantial Evidence

The Administrative Law Judge, and thus the Board, found that the Company violated Sections 8(a)(3) and (1) by refusing to rehire Muraca, because of his Union affiliation and the pendency of unfair labor practice charges.

Muraca's prior work history at the plant and the circumstances of his discharge are particularly relevant to the issue of the validity of the Company's decision not to rehire for two reasons: one, because the validity of the discharge was not challenged, even though Muraca's Union affiliation and participation were well known by the Company; the other, because Muraca's work performance, by his own admissions, was highly unsatisfactory.

Here again, the testimony relevant to this issue is not in conflict. Muraca was physically unable to perform the duties of his job as outside forklift operator and was appreciative of the fact that the Plant Manager, on his own initiative, transferred Muraca to an inside job. Muraca's display of appreciation, however, took the form of heavy absenteeism, resulting from his gambling and staying out every night. Again, the Plant Manager demonstrated considerable compassion and merely suspended Muraca for two weeks, rather than discharging him. In addition, vacation pay was advanced to Muraca at the time of suspension. It was only after Muraca failed to report back to work or call in following the period of suspension that he was refused further employment. The Plant Manager assumed, quite properly, that Muraca had voluntarily quit. Indeed, Muraca gave no explanation for his failure to report or call in.

Significantly, during this *entire* period of time, the Plant Manager knew of Muraca's Union affiliation. In fact, Linda Smith testified that the Plant Manger questioned her about Muraca's Union involvement.

Had the Company wanted to rid itself of a Union adherent, it would hardly have transferred that employee from an outside job or have given merely a suspension for heavy absenteeism. Rather, it would have terminated Muraca for his inability to work outdoors or for his continued failure to report for scheduled work.

The General Counsel presented no evidence as to the reason for Muraca's not being employed. Not even the statements attributed to Fazzino by Muraca disclose any such reason. Indeed, the record indicates that the work force had been reduced from twenty to twelve after the Easter season.

The only reasonable inference to be drawn from this undisputed fact is that the refusal to rehire Muraca on May 27, 1974, even had hiring been taking place, was due to the Company's unwillingness to rehire an employee who had been given and had "blown" two previous opportunities for employment at the plant. Muraca's comments to the Plant Manager that he, Muraca, was a "good worker" and couldn't understand why he could not be rehired demonstrate either a high level of naivete or a complete lack of candor. He had been anything but a "good worker" and both he and the Plant Manager knew it. This explains why no unfair labor practice charge was filed concerning the job transfer the discipline or the discharge, all of which occurred during the period of Union activity at the plant.

Moreover, Muraca, whose testimony remarkably is credited by the Administrative Law Judge, further testified that, when he asked for his job back in May and again in June, he saw that the Plant Manager was hiring new employees. There was *no* evidence presented by the General

Counsel to support such a finding and Muraca's testimony, standing alone, is incredible and hardly deserves to be credited. In fact, the record is clear that the work force was reduced from twenty (20) to twelve (12) immediately after the Easter season and was not increased.

It is the classic example of "grasping for straws" for the Administrative Law Judge to base his conclusion that Muraca was not rehired in May 1974 because of Union activity solely on the testimony of Muraca. First his testimony is shown to lack credibility; and, second, his testimony, even if believed, flies in the fact of the uncontroverted and conceded facts that Muraca never performed satisfactorily when employed and that the work force was *reduced*, not increased, in May and June 1974. We submit that the conclusion that Section 8(a)(3) and (1) was violated is unsupported by any evidence, substantial or otherwise.

Moreover, the remedy ordered by the Board is wholly inappropriate under the circumstances. It is improper and, indeed, inappropriate for the Board to compel reemployment of an admittedly incompetent employee, *Tomahawk Boat Manufacturing Corp.*, 144 NLRB No. 133, 54 LRRM 1255 (1963) or one with a poor attendance record, *Bankers Club, Inc.*, 218 NLRB No. 7, 89 LRRM 1812 (1975). Nor is reinstatement appropriate where, as here, the reduced work force could not accommodate reinstatement, *Crystal Princeton Refining Co.*, 222 NLRB No. 167, 91 LRRM 1302 (1976).

D. The Section 8(a)(1) Violations Are Unsupported By the Evidence

1. Supervisor Kosh's Statement to Bartle

The Administrative Law Judge concluded, on the basis of employee Bartle's testimony, that Supervisor Kosh's statement to him that "if there is a union coming in that it would not be permitted" violated Secion 8(a)(1). Kosh's

tone was friendly and noncoercive and, for some unexplained reason, the General Counsel offered no evidence as to the circumstances surrounding what otherwise is an inexplicable statement. Also remarkable is the fact that Bartle testified that the remark was made in November 1973, whereas the testimony of the Union officials places the origin of Union activities at the plant in early December 1973.

Nor was evidence offered by the General Counsel as to whether Kosh was closely allied with management or intimately involved in effectuating the Company's labor policies; no evidence was offered as to the number of men supervised by Kosh. Indeed, Bartle's supervisor was Fazzino, not Kosh, and only Fazzino had authority to hire or discharge. Thus, the record reflects that Kosh was nothing more than a senior experienced crew leader, whose comments are not attributable to the Company, *Western Sample Book & Printing Co.*, 209 NLRB No. 64, 86 LRRM 1171. Moreover, the incident was an isolated one, with no evidence to indicate that it represented the attitude of the Company in general or its president or Plant Manager in particular. As a matter of law, no violation can be found on the basis of this isolated incident.

Moreover, such noncoercive conversations are permitted under Board law. *Western Sample Book & Printing Co.*, 209 NLRB No. 64, 86 LRRM 1171 (Employer's inquiry if employee favored union); *Stouffer Restaurant*, 210 NLRB No. 49, 86 LRRM 1132 (1974) (Employer's inquiry if employees knew anything about union); *Home Comfort Products Co.*, 180 NLRB No. 89, 73 LRRM 1032 (1970) (Employer's inquiry of what employee thought of union).

To label this single series of conversations a form of interrogation is to remove from the area of permissible expression of views and discussion all subject remotely dealing with unions. Clearly, such types of conversations were not intended to be circumscribed by the provisions of Sec-

tion 8(a)(1) and are expressly protected by Section 8(c) of the Act. The findings as to this violation clearly are erroneous and unsupported by substantial evidence.

2. President Lasaponara's Meeting With the Employees

The Administrative Law Judge concluded that the series of meetings with groups of employees, conducted in the latter part of December 1973 by then President Lasaponara, constituted a violation of Section 8(a)(1).

The essence of Mr. Lasaponara's remarks were directed to the "family" atmosphere which the Lasaponara family had maintained at the plant throughout the years. He commented that this atmosphere would be lost if the employees had a Union. Other employees, called by the General Counsel and Respondents, gave similar testimony.

Significantly, most of the testifying employees supported Mr. Lasaponara's testimony that no threats or promises were made. Indeed, Union committeewoman Wilson (who charges that she was called a "troublemaker" for leading the Palm Sunday work stoppage) conceded that Lasaponara rejected her request for raises "as long as we were negotiating with the Union" (A .88) Other Union adherents testified that Lasaponara was polite, friendly and made no promises or threats. Employee Radley interestingly testified that, when fellow employee Bonville asked for a raise at the meeting, Mr. Lasaponara said "if he did give a raise, it would constitute a bribe" (A. 136).[10]

As a matter of fact, there was no interrogation of the employees in any sense of the word and no threats or promises.

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10 Thus, the Administrative Law Judge's refusal to credit the testimony of Mr. Lasaponara, which was *in fact* supported by the employees, is but another example of the Judge's disregard of any testimony, however corroborative it may be, which fails to support his preconceived notions of the "facts".

3. Plant Manager Fazzino's Interrogation of Employees

The Administrative Law Judge concluded that Fazzino's questioning of employees Smith and Marcelletta in January 1974 as to whether Union cards were signed and his questioning of employee Bartle in March 1974 as to whether "union meetings had taken place" constituted violations of Section 8(a)(1).

The first incident was initiated by the employees themselves, as Linda Smith testified. Moreover, the questions were isolated and were asked in the course of a conversation dealing with unrelated matters. There was no testimony offered that threatening gestures or tones were used.

As argued above, such noncoercive conversations are permitted under Board law and are protected under Section 8(c).

The findings as to this violation likewise are erroneous.

V. CONCLUSION

For the foregoing reasons, enforcement of the Board's Order of June 30, 1975, should be denied.

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UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 75-4215

National Labor Relations Board, Petitioner,

v.

A. Lasaponara & Sons, Inc., a Wholly Owned Subsidiary of ERE Industries, Inc. and ERE Industries, Inc.,
Respondents.

BRIEF FOR
A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC. and ERE INDUSTRIES, INC., RESPONDENTS.

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were served on the following person, who has been represented to me as opposing counsel in said action, by first class mail, with proper postage applied and deposited in a mail box of the United States Postal Service:

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